BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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OFFICE OF THE SECRETARY

97-154

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)))	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	))	MM Docket No. 87-8

PETITION FOR RECONSIDERATION OF
UCC *et al.*

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Summary

UCC *et al.* urge the Commission to reconsider in part its decision to revise the local broadcast ownership rules. Time and time again, the Commission has reaffirmed its dedication to the principles of diversity, competition and localism. Unfortunately, the Commission's recent decision to relax significantly the local broadcast ownership rules threatens these core principles.

The new rules will lead to a substantial decrease in the number and diversity of sources of information available to the viewing public and will have a detrimental impact on the already dire state of minority and female ownership in the broadcast industry. UCC *et al.* believe that it is not enough for the FCC merely to monitor this impact, but rather it must take steps to ensure that minorities and women have realistic opportunities to participate in the broadcast industry.

The FCC should also reconsider its decision to allow common ownership of two television stations within a Designated Market Area ("DMA") so long as eight independent television stations remain. The use of DMAs is problematic because it can lead to counting stations as "local voices" when they have little or no connection to the local community. Moreover, because DMAs vary greatly in size, change over time and are open to manipulation, they do not necessarily provide an accurate count of the viewing options actually available to the public. In addition, by using DMAs, the Commission improperly delegates a critical public interest responsibility to an unaccountable, private corporation with ties to the broadcast industry. Furthermore, the voice test adopted by the Commission is arbitrary because it applies a "one size fits all" eight-voice test to all markets irrespective of their size, demographics and the varying needs of distinct communities.

Accordingly, UCC *et al.* ask the Commission to revisit its decision concerning the

television duopoly rule. Ideally, the Commission should retain the duopoly rule using the Grade B standard. However, if the Commission decides to keep theDMA/voice counting approach, it should, at a minimum, ameliorate some of the obvious problems with this approach. Specifically, the Commission should exclude non-commercial stations from the local voice count, partition large DMAs that contain stations whose Grade B contours do not overlap, and require a larger minimum number of voices in the larger DMAs.

UCC *et al.* also ask the Commission to reconsider its decision to extend the radio/television cross-ownership waiver beyond the top fifty markets to *all* markets, regardless of the number of voices in the market. The Commission lacks authority to go beyond the Congressional instruction to expand cross-ownership waivers to the top fifty markets. Moreover, the extension to all markets, irrespective of the number of remaining voices, will permit excessive concentration of ownership, especially in small markets. We also ask the Commission to narrow the voice test so that it more accurately reflects the actual number of voices available to the public.

The Commission should also revise its waiver policy for the television duopoly rule and limit it to failed stations. This change would both make its waiver policy consistent with the waiver policy for radio-television cross-ownership, and increase opportunities for new entry. Finally, the Commission should enforce existing conditions on waivers. The failure to enforce existing conditions not only undermines diversity, but damages the Commission's credibility.

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TO: The Commission

PETITION FOR RECONSIDERATION
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Pursuant to Section 1.429 of the Commission's Rules, the Office of Communication, Inc. of United Church of Christ, Black Citizens for a Fair Media, Center for Media Education, Civil Rights Forum, League of United Latin American Citizens, Philadelphia Lesbian and Gay Task Force, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights, Wider Opportunities for Women, and Women's Institute for Freedom of the Press ("UCC *et al.*"), by their attorneys, the Institute for Public Representation (IPR) and the Media Access Project (MAP), respectfully ask the Commission to reconsider in part its decision to relax its broadcast ownership rules with respect to television stations in the same local market (the "duopoly" rule) and radio-television ownership (the "cross-ownership" rule) in *Review of the Commission's Regulations Governing Television Broadcasting, Report and Order*, FCC 99-209 (rel. Aug. 6, 1999 ("*Local Broadcast Ownership Order*").

UCC *et al.* collectively represent a broad spectrum of the listening public. As such, they have a strong interest in ensuring a diversity of sources of information about important local public issues. We are pleased that the Commission has reaffirmed that "one of the most important purposes of our multiple ownership rules is to encourage diversity in the ownership of broadcast stations so as to foster a diversity of viewpoints in the material presented over the airwaves." *Local Broadcast Ownership Order* at ¶ 17. Moreover, the Commission properly recognizes that broadcast stations, and particularly television stations, are the "primary source of news and entertainment programming for Americans" and that "ensuring diversity is most pressing at the local level." *Id.* at ¶¶ 18-19. Unfortunately, however, the rules adopted by the Commission significantly undermine both ownership and viewpoint diversity.

UCC *et al.* is particularly concerned about the impact the rule changes will have on opportunities for minorities and women to own broadcast stations. By allowing increased concentration of ownership and inflated station prices, the FCC has made it more difficult for all new entrants. The few existing minority and female owned stations will face increased competition and may be forced to sell.[1] While the FCC states that it "shares these concerns," its only response is that it "will monitor the effects of the relaxation of our local TV ownership rules on new entry." *Local Broadcast Ownership Order* at ¶ 13. UCC *et al.* respectfully suggest that

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[1] *See, e.g.* NTIA, *Minority Commercial Broadcast Ownership 1997-1998,* (visited Oct. 15, 1999) <http://www.ntia.doc.gov/opadhome/oldminown98/overu98.htm>. According to the report, for the period of August 1998 - August 1998, 160 minority broadcasters owned 337 of 11,524 commercial radio and television stations in the United States. Minority commercial broadcast ownership showed a negligible increase of .1%, from 2.8% in 1997 to 2.9% this year, a net gain of 15 stations. But even though minorities registered an increase in ownership of 15 stations, NTIA found that the *industry continues to lose minority owners*, losing 23 owners in 1997-1998 alone. In addition, "[s]ince August 1997, three of the largest and most experienced minority television station owners sold all of their stations to non-minority-owned companies." Moreover, ". . . minority owners report that, given the high prices of commercial television stations, those owners that were lost are unlikely to be replaced by new minority entrants."

this response is inadequate. Moreover, we question the FCC's ability to even do the promised monitoring. While the FCC recently reaffirmed its decision to collect data on the race and gender of broadcast station owners,[2] it appears that no one at the FCC has even been compiling this information to have a baseline of minority and female ownership for purposes of monitoring.[3]

As detailed below, the new rules undermine diversity in other ways as well. As a consequence, UCC *et al.* urge the Commission to reconsider its decision to replace the television duopoly rule with the Designated Market Areas/eight voices test, to limit the changes in the radio-television cross ownership rule to only those required by law, to limit waivers to cases of failed stations only, and to enforce the conditions on existing waivers of the one-to-a-market rule.

I. THE RELAXATION OF THE TELEVISION DUOPOLY RULE THREATENS DIVERSITY AND COMPETITION AT THE LOCAL LEVEL.

The Commission has replaced the duopoly rule, which prohibited common ownership of two stations with overlapping Grade B contours, with a new rule that permits common ownership of two stations within a Designated Market Area ("DMA"), so long as only one is a top 4-ranked station and eight independent voices remain in the market. *Local Broadcast Ownership Order* at ¶ 64. The use of a DMA, however, is not a good measure of the local television signals actually

[2] *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules and Processes, MM Dkt. No. 98-43, FCC 99-26* (rel. Oct. 6, 1999).

[3] IPR's inquiries to the FCC staff revealed that stations have been filing such information since February 1999 and that as of December, all stations should have filed this information with the FCC. However, the staff told us that the information was merely placed in the stations' files and was not being compiled or analyzed to determine the overall extent of minority and female ownership. Additional inquiries to verify this information have gone unanswered.

available to the public. As detailed below, using the DMA/voice count approach leads to a serious erosion of diversity and competition at the local level.

A. Use of the DMA/Local Voices Test Raises Numerous Problems.

The Commission has largely abandoned Grade B contours, a stable, straight-forward measure for determining whether television stations overlap, for a much less reliable measure of local television markets, DMAs.[4] DMAs are not a suitable standard on which to base ownership rules because they may include stations that do not serve the local community and are either overinclusive or underinclusive in terms of actual viewing options. Moreover, in choosing to rely on DMAs, the Commission has effectively delegated the authority for designating local markets to a private company, A.C. Nielsen. Because DMAs change over time, they will cause confusion and administrative difficulties. Finally, the use of the eight-voices test for all DMAs regardless of the size or diversity of the population is arbitrary and capricious.

1. Not all "voices" included in a DMA are truly "local."

One of the Commission's principal objectives is to ensure "that markets remain sufficiently diverse and competitive at the *local* level..." *See Local Broadcast Ownership Order* at ¶ 70 (emphasis added). The Commission premises its decision to switch to the DMA standard on the belief that DMAs are more accurate gauges of *local viewership* than Grade B contours. *Local Broadcast Ownership Order* at ¶¶ 47-48. Unfortunately, the Commission's confidence in the accuracy of DMAs as measures of local television voices is misplaced.

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[4] However, the Commission has decided to allow common ownership within the same DMA if stations' Grade B contours do not overlap. This is clear recognition on the Commission's part that DMAs are an imperfect measure. This issue will be more directly addressed in Part I(A)(2) of this petition.

the accuracy of DMAs as measures of local television voices is misplaced.

Because there are often atypical viewership patterns in one or two smaller counties within a large, multi-county DMA, some television stations are included in the local market "voice" count that do not have much actual viewership throughout the whole DMA. For instance, the 15-county Pittsburgh DMA contains three counties in West Virginia and Maryland, the DMA's three smallest in terms of TV Households.[5] The inclusion of these three counties adds two additional television stations to the DMA -- Maryland Public Television and West Virginia Public Television (WGPT and WNPB), based in the relatively distant towns of Oakland and Morgantown, respectively. It appears that these are the only three counties in the DMA where these stations can be easily viewed and have genuine viewership.[6] Yet, because of the inclusion of these two stations, the total number of "local voices" has been artificially inflated thus, allowing two mergers of stations actually located in Pittsburgh that would otherwise not be permitted. This inflation is artificial because WGPT and WNPB are not local "voices" for Pittsburgh.

Similarly, the Washington, D.C. DMA includes broadcast stations located in the relatively distant towns of Martinsburg, WV, Front Royal, VA Hagerstown, MD. *See 1999 Broadcasting & Cable Yearbook ("B & C Yearbook")* at B-232. The inclusion of these towns/counties adds an additional five broadcast stations to the DMA, thus increasing the merger and acquisition possibilities. It is unlikely that these peripheral stations have any significant

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[5] Monongalia and Preston Counties, WV and Garrett County, MD according to *1999 B & C Yearbook* at B-214.

[6] See DMA map, *Id.* Moreover, even if these stations could be viewed on cable, they still would not be addressing issues of concern to the citizens of the Pittsburgh area.

viewership within the core of the Washington DMA. The towns of Martinsburg, Front Royal and Hagerstown are not only situated geographically far from Washington, D.C., they also have distinct local issues and concerns. For the same reasons, Washington, D.C. television stations cannot reasonably be considered local "voices" for these outlying communities. The Pittsburgh and Washington DMAs are not unique. Among the top 20 DMAs are numerous instances where small, relatively distant counties with their own distinct local interests are included in the "local voice" count and artificially inflate the number of voices serving the entire DMA. *See generally B&C Yearbook* at B-154 - B-236.

Another problem with using DMAs is that DMAs are not strictly based on viewership. Broadcast stations can, for a variety of reasons, petition A.C. Nielsen to change their DMA assignments.[7] Because A.C. Nielsen's major clients are broadcasters who purchase its research information, the possibilities of manipulating the process of designating local television market are obvious. Given the fact that DMAs are not accurate measures of a local television voices available to the public and that they are open to possible manipulation by broadcasters, the Commission should not rely on DMAs as the basis for the new local television ownership rules.

2. Because of their varying sizes, DMAs can either overstate or understate viewing options.

DMAs range widely in size, with small DMAs generally located in the Eastern part of the U.S. and larger ones in the Western. As a result, DMAs frequently are either underinclusive or overinclusive in terms of the public's actual viewing options.

[7] *See Comments of the JET Broadcasting Co., Inc.* at 2-3. Commenter pointed out that the Commission had conceded that A.C. Nielsen does not always solely rely on audience viewing patterns in determining the composition of a particular DMA.

Where viewers are more tightly congregated, as in the eastern part of the U.S., a DMA may be significantly smaller than a station's Grade B contour.[8] Consequently, many television stations that could not merge in the past because of overlapping Grade B contours will be able to do so under the new rules. For instance, full-power television stations located in Washington, D.C. and Baltimore, MD have overlapping Grade B contours and thus, under the old rule, the stations could not have common ownership. Now, because Washington, D.C. and Baltimore MD form separate DMAs, the number of potential intramarket mergers/acquisitions has significantly increased, which in turn decreases the viewing options available to the public.[9] This is especially true because many viewers in the Washington DMA can and do watch Baltimore stations and vice versa.

Another example is the Providence, RI DMA that contains eight broadcast stations. *B & C Yearbook* at B-215. The Grade B contours of these stations overlap those of the Boston, MA (12 stations) and Hartford, CT (28 stations) DMAs. *1999 B & C Yearbook* at B-163, 186. Under the old rules, the Commission would have precluded such common ownership.[10] Because these cities constitute separate DMAs, the possibilities of common ownership have increased

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[8] *See www.fcc.gov* (Grade B Contour Maps) and *generally 1999 B & C Yearbook* at B-154-B-236.

[9] *See 1999 B & C Yearbook* at B-160, B-232. The Washington, D.C. DMA contains 23 local broadcast stations and the Baltimore, MD DMA contains 11. Under the old rule, because all stations' Grade B contours overlapped, no single entity could control more than one station. Now because A.C. Nielsen deems them to be two separate markets, a single owner could control up to two stations in Baltimore and two stations in Washington, D.C.

[10] *See www.fcc.gov* (Grade B Contour Maps) and *generally 1999 B & C Yearbook* at B-154-B-236. Review DMA for Providence, Hartford and Boston.

significantly.

The Commission has acknowledged that switching to the DMA standard would "generally be less restrictive than the current Grade B signal contour test." *Id.* at ¶ 51. While there is no doubt that the Commission intended some additional common ownership, it is not clear that the Commission was fully aware of the dramatic impact such a switch would have on the consolidation of ownership at the local level. With the new rule, the Commission will allow a single broadcaster to own up to four television stations in the same geographical area where before the rule the broadcaster could only own one. *See* n. 9, *supra.* Even if the Commission had anticipated such eventualities, it has not demonstrated that moving to the new DMA standard will not have an adverse impact on diversity, competition and the overall public interest.

The vast geographical coverage of some DMAs can also have an adverse impact on the public interest. There are numerous instances, usually in the midwestern and western regions, where DMAs are very large, sometimes encompassing entire states. For instance, the Salt Lake City DMA encompasses the entire state of Utah and 11 counties in neighboring Colorado, Wyoming, Idaho and Nevada. *See 1999 B & C Yearbook* at B-220. Another example is the sprawling Denver DMA which covers 57 non-contiguous counties in four different states. *See id.* at B-174. The most current version of Denver's DMA includes Eureka county in central Nevada, a state that does not even border Colorado. *Id.* In previous years, the Denver DMA has included non-contiguous counties in Montana and South Dakota, both states that do not border Colorado. *See 1996-8 B & C Yearbook* (Denver DMA). These larger viewing areas are made possible through the use of cable and signal translators that can relay television broadcasts to far-flung areas. The danger in having such enormous "local" markets is that smaller, more rural and outlying stations will be lumped in the same DMAs with large metropolitan stations that do not form cohesive markets with similar "local" needs and interests. These DMAs overstate viewing options and allow mergers/acquisitions that should not take place because not all stations within a DMA serve as a "voice" for the entire local viewing market.

The Commission concedes that there are some DMAs that are so large that there will be stations whose Grade B contours do not overlap. *See Local Broadcast Ownership Order* at ¶ 51. Nonetheless, the Commission will permit all the stations assigned to such DMAs to be counted in the local "voices" count. *Id.* at ¶ 53. This means that there are local "markets" whose assigned stations are not viewable by all television households in that DMA, and thus the voice count overstates viewing options available to the public. The result of such overcounting is that more mergers can take place and the number of independently-owned television stations will drop below eight in some areas.

3. The Commission has improperly delegated a critical governmental responsibility to a private company.

UCC *et al.* are also troubled by the Commission's decision to delegate a critical governmental responsibility to A.C. Nielsen, a private, for-profit company with very close ties to the broadcast industry.[11] By using DMAs instead of Grade B contours, the Commission has indirectly allowed A.C. Nielsen to determine which mergers and acquisitions can take place. Because of the important impact on the public of theses mergers/acquisitions, it is inappropriate for the Commission to delegate a key function to a private company. Consequently, sound

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[11] A.C. Nielsen's clients are almost exclusively broadcast stations who purchase its research data.

public policy requires that the government retain significant control over the process of determining what compromises local television markets.

As a practical matter, UCC *et al.* are also concerned that the lack of public access to A.C. Nielsen data will impede effective review of proposed transfers.[12] The Commission itself is not a subscriber to the A.C. Nielsen service and has no apparent means of testing and evaluating the methodologies employed by the company.[13] It is not clear how the Commission will monitor compliance with its rules and credibly evaluate merger/acquisition applications without this information. Presumably, the Commission will rely on information provided by applicants who are subscribers, a process that contains obvious risks. For instance, broadcasters could use their leverage as A.C. Nielsen's clients to force the company to change their DMA assignments.

In addition, because A.C. Nielsen data is not publicly available for free, public participation in licensing will be severely hampered. The Commission has repeatedly acknowledged the importance of public participation in both licensing and rulemaking. *See generally Office of Communication of the United Church of Christ vs. FCC*, 359 F2d. 994 (D.C. Cir. 1966). But for the public to participate effectively in FCC proceedings, access to data is paramount. Unfortunately, the Commission has made no provision for guaranteeing public interest groups access to local market data and survey methodologies that A.C. Nielsen may consider proprietary. In a real sense, A.C. Nielsen, under the new regime, will now "own" a

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[12] Staffers from the Institute for Public Representation have made repeated attempts to obtain basic DMA information directly from A.C. Nielsen but have been unsuccessful.

[13] An IPR intern attempting to do research on A.C. Nielsen survey methodologies at the FCC's Library was told that the Commission does not have such data.

critical part of the Commission's local broadcast ownership rulemaking and licensing process and as a result, public participation will become marginalized.

4. DMAs are not reliable measures of the local market and cannot ensure an accurate and stable voice count.

If the FCC persists in using DMAs, it is likely to be confronted with a variety of administrative problems. DMAs are unstable because as viewing patterns are updated every television-viewing season, county assignments to a given DMA shift accordingly. Over ten percent of the 210 DMAs designated by A.C. Nielsen have registered changes in their composition in the past three years. *See generally 1997, 1998 and 1999 B&C Yearbooks.*[14] These shifts can in turn directly affect the number of broadcast stations and "voices" in a DMA.[15] Consequently, tying local ownership rules to DMAs would likely yield inconsistent results as the permissibility of certain transactions could vary from year to year.

Under the new rule, merged/acquired stations that initially met the FCC's joint ownership criteria might be out of compliance upon a shift in a DMA. The Commission stated it will not,

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[14] A.C. Nielsen compiles DMA information annually and this information is reported in the *Broadcasting and Cable Yearbook.* In order to see changes in individual DMAs over time, it is necessary to review the specific DMA(s) each year to observe variations in county assignments. Numerous changes have occurred in DMAs of all sizes, in first, second, third and forth tier markets. *Id.* Examples where there have been county shifts in DMAs are Chicago, IL (#3 market), Cincinnati, OH (#32 market), and Columbia, SC (#86 market).

[15] For instance, the Flint-Saginaw-Bay City, MI DMA contains nine televisions stations located in six jurisdictions. It is entirely possible that, within the space of a single viewing season, a shift in one or two of the peripheral counties could remove as many as three broadcast stations from the DMA. There are three broadcast stations in Mt. Pleasant, Bad Axe and University Center, MI each located in one of the more peripheral counties in the DMA, Isabella, Huron and Shiawassee Counties, respectively. Such a shift would leave only 6 local "voices" in the DMA. *See 1999 B & C Yearbook* at B-180.

post-merger, require the common owner(s) to divest in the event that the 8 "voices" test is violated, although it will not automatically allow the transfer of the duopoly to a new owner. *See Local Broadcast Ownership Order* at ¶64. This undermines the Commission's claim that the eight "voices" test would "bring certainty to the permissibility of these transactions." *See id.* More importantly, this illustrates how the use of DMAs leads to arbitrary results and ultimately, a reduction in diversity.

5. Given the wide variations in DMA size and demographic composition, a blanket 8-"voices" test is arbitrary and capricious.

Another problem with the new rule is that it adopts a "one-size-fits-all" voice test that fails to take into account variations in DMA size and composition. DMAs vary tremendously in terms of size, whether by area or population. Some DMAs, such as New York and Los Angeles -- the number one and number two television markets respectively -- contain millions of television households.[16] On the other hand, the Presque Isle, ME and Glendive, MT DMAs, number 204 and 210 DMAs respectively, have fewer than 26,000 television households.[17] Thus, the New York DMA is over 1,500 times larger than the Glendive DMA.

In addition, DMAs vary significantly in terms of their demographics. New York and Los Angeles, as is the case in most of the largest DMAs, have highly heterogeneous populations containing many racial, ethnic, linguistic, religious and political groups. Within these areas there is a plethora of viewpoints that should be given the opportunity to be expressed and heard. The

[16] *See 1999 B & C Yearbook* at B-198, B-207. The New York and Los Angeles DMAs have 6,812,540 and 5,135,140 television households, respectively.

[17] *Id.* at B-183, B-215. The Presque Isle, ME and Glendive, MT DMAs have 25,730 and 4,010 television household respectively.

Commission has not adequately explained how a minimum of eight voices could serve these needs. Despite these significant disparities among DMAs, the Commission has chosen an eight-"voice" test that applies to all. There does not appear to be any rational basis for applying this test universally to all DMAs irrespective of size.

B. The Commission Should Return to the Grade B Contour Standard or, at a Minimum, Alter the Way in Which it Proposes to Use DMAs and the "Voices" Test.

Because of these problems with DMAs, we urge the Commission to return to the Grade B contour standard. The Grade B standard is a well-known, easy-to-determine means of measuring a station's reach and potential viewership. In addition, the Grade B contour remains constant and less open to manipulation, thereby providing a clear and stable standard for applying local ownership rules. However, if the Commission decides to retain the DMA as the standard for determining a local television market, we urge the Commission to take several practical steps to remedy the problems discussed above.

1. Non-commercial educational stations should not be included in the local "voices" count.

In the event the Commission chooses to retain the DMA standard and local "voices" test, non-commercial stations should not be included in the local "voices" count.[18] In the first place, including non-commercial stations in the voice count is inconsistent with the Telecommunications Act of 1996. In Section 202(b) of that Act, Congress mandated the Commission to adopt local ownership rules for radio ownership in which the number of stations

[18] The Minority Media and Telecommunications (MMTC) Council endorses this proposal.

that could be commonly owned turned on the number of *commercial* radio stations in the market.

Moreover, to the extent that the local television ownership rules are designed to promote competition in the sale of advertising time, *see Local Broadcast Ownership Order* at ¶ 28, it does not make sense to include stations that do not sell advertising. Because non-commercial stations play no role in local advertising markets, including them in the voice count inflates the actual extent of competition.

The extent of this inflation can be quite substantial as some DMAs have a large number of non-commercial stations. For example, the Washington, D.C. DMA has a total of 16 commercial and 7 non-commercial television stations. *See 1999 B & C Yearbook* at B-232. The Boston DMA has 21 commercial and 7 non-commercial television stations. *Id.* at B-163. Including all of these non-commercial television stations in its local "voice" count has the perverse effect of allowing a larger number of commercial stations to merge, thus significantly reducing both competition in the advertising market and the number of viewpoints available to the public.

While there is no question that non-commercial stations play an important role in providing news, educational programming and entertainment to viewers, our review of DMAs reveals that noncommercial stations are often counted in the DMA even when they do not provide programming for the majority of the area included within the DMA. For instance, in the Pittsburgh example discussed *supra* at Part I(A)(1), two out-of-state public television stations were included in the Pittsburgh DMA.

2. The FCC should partition DMAs that contain stations with non-overlapping Grade B contours.

The Commission should subdivide large DMAs that contain broadcast stations whose Grade B contours do not overlap. This would address those situations where stations are counted as local "voices" for residents who are unable to view those stations' broadcasts.

3. The Commission Should Use a sliding scale based on the number of television households in a DMA to determine the minimum number of "voices."

Instead of using the eight-voices test for all markets, the Commission should use a sliding scale pegged to the number of television households in the DMA. For instance, DMAs with over two million television households might be required to have a minimum of 15 local "voices." DMAs with one to two million television households could be required to have at least twelve minimum "voices" and markets (DMAs) with between five hundred thousand and one million television households would have to have at least ten local "voices." Finally, DMAs with fewer than five hundred thousand television households would be required to have a minimum of eight local "voices." Alternatively, the minimum number of voices could be based on the DMA's rank.

This approach would be more consistent with that mandated by Congress for radio-television cross-ownership. *See infra* at Part II(A). This modified test would help to rectify some of the drawbacks of using DMAs by taking into consideration the variation in the size of DMAs. Furthermore, the test would better serve the public by affording more viewing options to those living in more highly populated DMAs.

In sum, the new rules adopted by the FCC will substantially decrease diversity even below the levels that the FCC considers essential for the public interest. UCC *et al.* urge the FCC to abandon this DMA/voice count approach in its entirety. However, if the Commission retains this approach, at the very least, it must make changes to ensure that voice counts are not artificially inflated and that larger markets are assured of a more appropriate and proportionate minimum number of voices.

II. THE RADIO/TELEVISION CROSS-OWNERSHIP RULE FAILS TO ADEQUATELY PROMOTE THE COMMISSION'S DIVERSITY GOALS.

The Commission's new rules regarding radio-television cross-ownership generally make it easier for radio and television stations in the same market to merge, without safeguarding the Commission's long-standing goal of protecting diversity. Essentially, the Commission eliminated its presumptive waiver policy which allowed case-by-case waivers for stations in the top 25 markets as long as 30 independent "voices" remained. Cross-ownership is now based on a three-prong test, where mergers can occur in *all* markets, based on an over-inclusive voice counting test.

The new cross-ownership rule conflicts with the Commission's explicitly stated goal of encouraging diversity "in the ownership of broadcast stations so as to foster a diversity of viewpoints in the material presented over the airwaves." *Local Broadcast Ownership Order* at ¶ 17. The Commission has rejected the argument that commonly-owned outlets can produce diverse viewpoints equally as well as separately owned outlets and has also accepted the link between diverse ownership and diverse programming. *Id.* at ¶ 22. The Commission stated that "intuitive logic and common sense support our belief that the identity and viewpoint of a station's owner can in fact influence a station's programming." *Id.* Yet, the FCC's new rules permit excessive common ownership, especially in small markets.

We urge the FCC to reconsider its unjustified decision to expand eligibility for radio/TV mergers to all markets. In the alternative, we ask the Commission to narrow the voice test so that it more accurately reflects the actual number of voices available to the public in any given market.

A. The Commission Has No Justification for Expanding Station Eligibility for Mergers Beyond the Top 50 Markets and Lowering the Minimum Number of "Voices"

Section 202(d) of the Telecommunications Act directed the FCC to relax the one-to-a-market rule by expanding its top 25/30 voices waiver policy to the top 50 markets. Yet, the Commission expanded eligibility for cross-ownership to all markets and lowered (and in some cases eliminated) the minimum voice count. Specifically, the new rules permit a party to own up to two television stations and six radio stations so long as 20 independent voices remain, up to two television stations and four radio stations so long as ten voices remain, and up to two television stations and one radio station regardless of the number of voices remaining. *Local Broadcast Ownership Order* at ¶ 100.

First, the Commission should not have extended eligibility for waivers to stations in all markets. In its Order, the Commission recognizes that Congress only directed it to extend the radio/TV cross-ownership allowance from the top 25 to the top 50 markets. *Local Broadcast Ownership Order* at ¶ 107. The language of the Act does not require the Commission to allow radio/television cross-ownership in all markets. Furthermore, nothing in the legislative history of Section 202(d) suggests that Congress intended for the FCC to go beyond the top 50 markets.[19]

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[19] The Conference Report specifically states that the intention of Congress in adopting subsection (d), was to "extend the benefits of this policy [the waiver policy] to the top 50 markets." *H.R. CONF. REP. NO. 104-458* at 163.

Moreover, the Conference Report stated that the Commission was "to take into account the increased competition and need for diversity in today's marketplace" when formulating any rule changes or implementing its waiver policy.[20]

Second, the Commission lowered the minimum number of "voices" that must remain in the market post-merger from 30 to 20 in some cases and 10 in others, without providing a justification. According to the Commission, a rule based on the number of independent "voices" remaining in the market post-merger, rather than market rank, "more accurately reflects the actual level of diversity and competition in the market." *Local Broadcast Ownership Order* at ¶ 107. However, the Commission nowhere explains why 20 or ten voices provides sufficient diversity. Such an analysis is required when an agency rescinds or modifies a previously promulgated rule.[21] As justification for relaxing the rule in general, the Commission merely references the "record in the proceeding," which it says "demonstrates that there are significant efficiencies inherent in joint ownership." *Local Broadcast Ownership Order* at ¶ 105.[22] More specific analysis is required.

Finally, the third prong of the new cross-ownership rule, which allows the merger of a

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[20] *Id.*

[21] *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983). The Court held that a change or recision to a law is akin to the promulgation of the rule itself, and is subject to the same arbitrary and capricious standard. The agency may be required to justify more fully its decision than if the agency had not acted in the first instance.

[22] The Commission's finding about efficiencies is supported only by anecdotal evidence from broadcasters with an obvious self-interest in making such claims. *See Local Broadcast Ownership Order* at ¶¶ 34-36. At most, the FCC concluded that joint ownership "*may* contribute to programming benefits." *Id.* at ¶ 36 (emphasis added).

radio station with a television station regardless of the number of "voices" left in the market, completely undercuts the Commission's stated interest in promoting diversity. The problem will be most severe in smaller markets, where the merger of a radio station with a TV station could severely limit the diversity of viewpoints available to the public.

Thus, on reconsideration, the Commission should limit radio-television cross ownership to the top 50 markets, where 30 independent voices remain, as mandated by Congress. The current rules allow excessive concentration of ownership and thus impermissibly restrict diversity, especially in the smaller markets.

B. The Commission Should Alter the Method of Voice Counting to Reflect Better the Actual Sources of Local Information Available to the Public.

Although revision of the rules as described above would best serve the public interest, should the FCC decide to retain its new rules, at a minimum, it should alter the way it counts "voices." The current approach counts too many "voices" and must be narrowed. Since some mergers will be permitted only when the voice count is satisfied, how "voices" are counted becomes crucial. Under the new rules, the Commission currently counts:

1. All independently owned and operating full-power commercial and non-commercial broadcast television stations.
2. Same as above but for radio stations in a radio market.
3. All independently owned daily newspapers published in the applicable DMA that have a circulation exceeding 5% of the household in the DMA.
4. Cable systems count as one voice.

Local Broadcast Ownership Order at ¶ 111. The voice count is meant to "accurately reflect the actual level of diversity and competition in the market." *Id.* at ¶ 107. However, as in the local television context, it is apparent that the FCC's voice counting approach does not accurately reflect either the number of voices that the public receives nor the amount of actual competition. *See supra* at Part I(A)(2).

First, the Commission's voice count includes stations that may only have partial coverage in the relevant market area. Stations that do not reach any significant portion of the viewing/listening public in a given market should not be counted. The more "voices" that are counted, the easier it is to merge, even though the actual diversity among the most watched and listened to stations may be artificially inflated. Similar to the problem that will occur in the local television market discussed above, a number of mergers and acquisitions that never should have taken place will occur. The Commission's suggested voice counting therefore, allows for greater concentration of media ownership, which in turn, dilutes diversity.

To address the problem of artificial inflation, the Commission should impose a threshold requirement that stations are required to meet before they may be included in the voice count. The FCC has already excluded newspapers with less than a 5% circulation because "although we recognize that other publications also provide a source of diversity and competition, many of these are only targeted to particular communities, and are not accessible to, or relied upon by, the population throughout the local market." *Local Broadcast Ownership Order* at ¶ 113. Similarly, only those broadcast stations that meet a similar minimum listenership/viewership threshold should be counted.

Second, the Commission should not count non-commercial stations in the voice test. As discussed above, counting non-commercial stations in the cross-ownership rule is inconsistent with Congressional intent. Moreover, such a count overstates the amount of competition, since these stations do not sell advertising time. *See supra* at Part I(B)(1).

III. THE COMMISSION SHOULD REVISE THE WAIVER POLICY FOR FAILED, FAILING AND UNBUILT STATIONS.

In addition to allowing common ownership where the voice tests are met, the FCC will also permits waivers that will reduce the number of voices below the minimum where one of the stations has failed, or in some cases, is failing or unbuilt. In the case of the radio-television cross-ownership rules, the FCC has properly limited waivers to only "failed" stations. *Local Broadcast Ownership Order* at ¶¶ 115-18.[23] However, the Commission has adopted a broader waiver policy for local television ownership that includes waivers for "failed," failing," and "unbuilt" stations. *Id.* at ¶ 70. In rejecting a waiver for a "failing" station under the radio-television cross-ownership rule, the Commission stated, "evidence that a station is losing money (i.e., a negative cash flow) is not adequate to qualify for the waiver." *Id.* at ¶ 118. But the Commission nowhere explains why the same reasoning should not apply to television stations. Thus, there appears to be no rational basis for the difference in the policies.

Moreover, the availability of waivers for failing and unbuilt stations undermines opportunities for new entry. As UCC *et al.* pointed out in our earlier comments, such distressed properties "could offer minority, female and other independently-owned voices (who traditionally have less access to capital) an opportunity to enter the increasingly expensive

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[23]UCC *et al.* have concerns about the way the FCC has defined a "failed station." One of the showings that the applicant must make is that "selling the station to an out-of-market buyer would result in an artificially depressed price for the station." *Id.* at ¶ 75. The term "artificially depressed" is obviously subject to manipulation. But more importantly, the FCC in effect guarantees that the seller will not lose money. This protects a licensee from one of the risks of a competitive market, the risk that one will lose money, and is flatly inconsistent with the FCC's purpose of promoting competition.

broadcast marketplace." *See Comments of Media Access Project, et al., in MM DKT. 91-221* at 18 (Feb. 7, 1997). Just because a station is failing under one owner does not mean that a new owner, with new ideas and perhaps a desire to serve an unserved audience, will not be successful. By permitting waivers for failing or unbuilt television stations, the Commission virtually assures that an existing owner in the same market will purchase the station instead of providing an opportunity for a new entrant.[24] Thus, the FCC should limit waivers only to cases involving a failed station.

IV. THE COMMISSION SHOULD ENFORCE THE CONDITIONS ON EXISTING WAIVERS.

The Commission notes that it has granted a number of waivers of the radio-television cross-ownership rules conditioned on the outcome of this proceeding. *Id.* at ¶ 123. While some ownership combinations will be permitted to continue under the new rules, others will not. Despite the fact that the parties receiving these waivers were placed on "specific notice" that they might have to divest, the FCC nonetheless decided to extend the conditional waivers until the conclusion of the biennial review in 2004. In addition, the Commission extends this grandfathering relief to any *pending application* for conditional waiver filed on or before July 29, 1999. *Id.* at ¶ 124.

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[24] Almost by definition, a television station will be of greater value to a buyer already in the same market, since by buying another station in the same market the buyer can reduce competition, expand audience share and take advantage of the efficiencies of joint operation. Consequently, in-market buyers are typically willing to pay substantially more for another station in the same market than an out-of-market station or new entrant. Thus, waivers for failed, failing and unbuilt stations will have the effect of allowing in-market buyers to participate in the buying process, something that the rules would not ordinarily allow them to do, and offer prices against which other bidders cannot compete. *See* Elizabeth Rathbun, *Ready, set...duopoly*, BROADCASTING AND CABLE, Aug. 9, 1999, at 4.

The failure to enforce existing conditions not only undermines diversity, but damages the Commission's credibility. It will be even more difficult for a future Commission to enforce the conditions in 2004, since these unlawful arrangements will have been in effect for at least five additional years.[25] Moreover, licensees will be encouraged to seek additional waivers, knowing that any conditions are unlikely to be enforced. These actions belie Chairman Kennard's claim that this proceeding has brought to an end "administration by waiver, not by rule." *Separate Statement of Chairman Kennard. See also Statement of Commissioner Tristani* (expressing concern that "one-to-a-market rules was effectively eviscerated by a Commission waiver process that became, in practice, a rubber stamp"). The Commission's action here, especially its grandfathering of applications that have not even been granted, goes well beyond what is required in terms of fairness to licensees. The Commission's refusal to enforce existing conditions and its award of additional waivers undermines both the Commission's authority and the public's interest in diversity.

Conclusion

UCC *et al.* urge the partial reconsideration of the Commission's decision regarding local broadcast ownership rules. The Commission's decision to relax the television duopoly rule and radio/television cross-ownership rule is detrimental to the public interest because it will lead to a substantial decrease in the number and type of voices available to the public. We are particularly concerned about the impact of these new rules on minority and female ownership, a problem that is compounded by allowing television duopoly waivers where a station is failing or unbuilt.

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[25] For the same reasons, we also oppose the FCC's decision to grandfather LMAs entered into before November 5, 1996 conditioned on the 2004 review. *Id.* at ¶ 146.

Furthermore, the DMA/voice test adopted by the Commission for local television is not sufficiently precise or stable to use effectively. Moreover, in permitting radio-television cross-ownership in markets ranked below the top 50, the FCC has exceeded Congressional intent. Finally, the FCC's refusal to enforce existing conditions on waivers undermines both diversity and the agency's credibility. Therefore, UCC *et al.* urge the Commission to reconsider its decision to replace the television duopoly rule with the Designated Market Areas/eight voices test, to limit the changes in the radio-television cross ownership rule to only those required by law, to limit waivers to cases of failed stations only, and to enforce the conditions on existing waivers of the one-to-a-market rule.

Respectfully submitted,

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